No. 01-1107

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 2002

COMMONWEALTH OF VIRGINIA

PETITIONER

v.

BARRY ELTON BLACK, RICHARD J. ELLIOTT,
AND JONATHAN O'MARA,

RESPONDENTS

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF VIRGINIA

BRIEF OF AMICUS CURIAE THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan organization located in Charlottesville, Virginia. Founded in 1990, the Center has as its sole mission the protection of free speech and press against threats in many forms. The Center has participated actively in the litigation of First Amendment issues, and has filed *amicus curiae* briefs in the United States Supreme Court, the Federal Courts of Appeals, and in numerous state courts. In the instant matter as it pertains to Respondent Barry Black, the Center filed briefs as *amicus curiae* in the Circuit Court of Carroll County, the Virginia Court of Appeals, and the Virginia Supreme Court. Consent to file in this Court was granted by all the parties.

NATURE OF THE CASE AND STATEMENT OF FACTS

This matter involves a consolidated appeal arising out of two separate incidents and three convictions of violating Virginia Code § 18.2-423, which reads:

> It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony. Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.

The first incident took place on May 2, 1998 in Virginia Beach, Virginia. Respondents Richard J. Elliott and Jonathan O'Mara attended a party at the home of David Targee. While at the party, Elliott told several people that his neighbor, James J. Jubilee, an African-American, had complained about the discharge of firearms in Elliott's backyard. In response, Elliott suggested they burn a cross in Jubilee's yard. Elliott, O'Mara, and Targee constructed a crude wooden cross in Targee's garage, transported it to Jubilee's yard, placed it in the ground, and lit the cross.

The second incident occurred on August 22, 1998 in Cana, Virginia. Respondent Barry Elton Black led a Ku Klux Klan rally on private property. The rally was conducted with the permission of the landowner, who was present during the rally. In the course of the rally, Klan members set fire to a cross, approximately 25 to 30 feet in height. The burning cross was observable from parcels of land adjoining that on which the rally took place. While the cross burned, the hymn *Amazing Grace* played over a loudspeaker system. In a jury trial in the Circuit Court of Carroll County, Respondent Black was convicted of violating Virginia Code § 18.2-423.

In a consolidated appeal, the Virginia Supreme Court reversed the convictions of O'Mara, Elliott, and Black, finding that Virginia Code § 18.2-423's targeting of cross burning was a viewpoint–based restriction in violation of the First Amendment. *Black v. Commonwealth*, 262 Va. 764 (2001).

SUMMARY OF ARGUMENT

This case presents a stark contrast between two values of the highest order within our Constitutional system. On the one hand, the Commonwealth admirably seeks to regulate hateful actions and expression that threatens its citizens. Yet whatever sanctions government may impose for this purpose must satisfy the rigorous standards established by this Court for the protection of free expression under the First Amendment. The policies reflected in the statute under challenge in this case are wholly consonant with the laudable goals of protecting citizens from fear and intimidation. Yet, as the Virginia Supreme Court ruled, the means chosen by the Commonwealth to serve that end restricts expression protected by the First Amendment. For that reason, they may not be used even for the worthiest of purposes.

Moreover, states possess constitutionally acceptable means for achieving these goals. The activity charged as criminal in this case is indisputably expressive, however hateful and abhorrent it may be to thoughtful citizens. Indeed, were the burning of a cross not highly communicative, it is doubtful that states would seek so consistently to punish the act. Because cross burning is expressive, and conveys a distinctive message to those who view it, a statute that punishes those who burn crosses must be viewpoint-neutral. The statute must also be precise enough to afford adequate guidance to persons who are potentially subject to its provisions. The scope of such a law must not be so broad as to reach, and

potentially subject to legal sanctions, any substantial amount of expression that the First Amendment protects. The challenged statute fails appreciably to meet each of these tests. It is for these reasons that *amicus* urges affirmance of the judgment of the court below.

I. CRIMINAL SANCTIONS IMPOSED ON EXPRESSIVE ACTIVITY MUST INVOKE A RECOGNIZED EXCEPTION TO THE FIRST AMENDMENT'S PROTECTIONS.

As the court below recognized, the burning of a cross is undeniably expressive activity, "however pernicious the expression may be." *Black*, 262 Va. at 771. It is as fully expressive as the actions which this Court found to be communicative in *Tinker v. Des Moines Independent School Dist.*, 393 U.S. 503 (1969) (wearing of armbands) and *Texas v. Johnson*, 491 U.S. 397 (1989) (burning the United States flag). In such cases, and many others involving nonverbal expression, this Court has insisted that such expression may be punished only under conditions that fully satisfy the safeguards of the First Amendment. Most clearly, a particular message may not be made the subject of criminal sanctions because government finds objectionable its content or the viewpoint it expresses. While this principle emerged most clearly in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), its roots trace to much earlier decisions, *e.g., Schacht v. United States*, 398 U.S. 58, 63 (1970)("[A law] which leaves Americans free to praise the war in Vietnam but can send persons...to prison for opposing, cannot

survive in a country which has the First Amendment.") Even where, as in *R.A.V.* itself, a category of expression may be presumptively unprotected, government may not selectively favor or disfavor particular messages. The only question posed by the present case, and one which the parties centrally dispute, is whether or not the challenged statute selectively disfavors a particular message.

A. Virginia Code § 18.2-423 is a content-based restriction on speech.

Perhaps because the Commonwealth recognizes the presumed unconstitutionality of content-based restrictions on speech, a substantial portion of petitioner's brief argues that Virginia Code § 18.2-423 is content-neutral because its sanctions apply to all persons, regardless of their motives, who burn crosses with an intent to intimidate. *See, e.g., Brief of Petitioner*, Commonwealth of Virginia, at 9. But neutral or uniform *application* of a law, in terms of the persons who are subject to its sanctions, in no way removes or avoids a charge of *selectivity in the content* of its provisions, of the type that the court below found to be a fatal flaw in the statute now under review. In addition, the Commonwealth's argument reflects a basic misperception of First Amendment jurisprudence because it confuses restrictions that are content-based with those that are directed against a particular viewpoint. While all viewpoint restrictions are content-based, not all content-based restrictions necessarily involve viewpoint discrimination. A

content-based regulation of speech is one that is directed at the subject matter - the content - of the expression. A content-based statute is presumptively invalid unless it disfavors, or singles out for special treatment, an entire category of speech that traditionally has received less than full First Amendment protection. "Content-based restrictions are presumptively invalid. From 1791 to the present, however, our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas..." *R.A.V. v. City of St. Paul,* 505 U.S. 377, 382 (1992) (citations omitted). The fact that a statute criminalizes obscenity, for example, does not mean that the statute is content-neutral. Rather, an obscenity statute is a ban upon a category of expression to which, despite its content-based focus, the presumption of constitutional invalidity does not apply.

By recognizing that "the focus of the Virginia statute is intimidation," *Petitioner's Brief* at 9, the Commonwealth effectively concedes that the statute is directed at the content of the expression, specifically at threats. The inescapable conclusion that Virginia Code § 18.2-423 is content-based gains added force from the fact that the very harm that the statute seeks to prevent is the probable reaction or response of persons who witness the highly evocative burning of a cross. Such a concern, however laudable it may be as a matter of state policy or legislative action, hardly serves to remove the content-selectivity of a statute that reflects such a focus. As this Court has consistently cautioned, "Listener's

reaction to speech is not a content-neutral basis for regulation." *Forsyth County v. Nationalist Movement,* 505 U.S. 123, 134 (1992).

The Commonwealth correctly argues, however, that even if Virginia Code § 18.2-423 is content-based, that fact does not entirely dispose of First Amendment analysis. If, indeed, such a law could be shown to target specifically an entire category of unprotected expression, it might nonetheless survive scrutiny. Threats, for example, comprise a category of proscribable speech. *See, e.g., Watts v. United States,* 394 U.S. 705 (1969). A statutory ban on all threats – at least all "true threats" within the meaning of the *Watts* decision – would presumably pass constitutional muster. Accordingly, the proper inquiry here is whether Virginia may single out, within the larger category of all threatening expression, only those threats that involve the burning of a cross. The court below concluded that such a specific focus – admittedly a form of expression with great potential to instill fear in viewers – rendered the law constitutionally infirm.

B. The Virginia Supreme Court correctly ruled that Virginia Code § 18.2-423 unconstitutionally discriminates on the basis of viewpoint.

The Virginia Supreme Court correctly ruled that Virginia Code § 18.2-423 is "analytically indistinguishable" from the ordinance that this Court invalidated in *R.A.V.* At issue in *R.A.V.* was a St. Paul, Minnesota ordinance that provided:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

505 U.S. at 380 (quoting St. Paul, Minn., Legs. Code § 292.02 (1990)).

Although this Court felt bound by the Minnesota Supreme Court's "authoritative statement that the ordinance reaches only those expressions that constitute 'fighting words' within the meaning of *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)," it nevertheless found the statute facially unconstitutional because "it prohibits otherwise permitted speech solely on the basis of the subject the speech addresses." *R.A.V.*, 505 U.S. at 381. Because "[i]n its practical operation... the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination," Minnesota's claim that the statute criminalized only "fighting words" did not save the law under the First Amendment. *Id.* at 391.

In its brief before this Court, the Commonwealth presses the validity of a law that is, in several respects, strikingly similar in structure and effect to the St. Paul ordinance. First, Virginia Code § 18.2-423 specifically targets a highly evocative symbol that reflects virulent notions of racial supremacy. *See id.* at 392. Indeed, the potential harm to First Amendment freedoms is even

greater in this case than it was under the St. Paul ordinance, because Virginia Code § 18.2-423 makes it unnecessary for the Commonwealth to initially establish any element of mens rea, and instead treats the expressive activity itself as prima facie evidence of an intent to intimidate.

Second, in this case as in *R.A.V.*, the fact that a criminal statute targets expression falling within a category of less than fully protected speech in no way avoids First Amendment scrutiny. The Commonwealth's claim that the targeted expression entails "threats" does not differ in substance from the comparable claim in *R.A.V.* that the conviction was valid because the focus was "fighting words." The rationale of *R.A.V.* – that government may not disfavor certain viewpoints even when they are conveyed by less than fully protected means – applies with equal force here: "The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content." *Id.* at 392.

Nor, as the Commonwealth argues, does the fact that the ordinance in *R.A.V.* prohibited cross burning carried out "on the basis of race, color, creed, religion or gender," whereas Virginia Code § 18.2-423 contains no such explicit viewpoint-based provision, serve to distinguish the two cases for First Amendment purposes. To reach that conclusion would require this Court to review Virginia Code § 18.2-423 wholly out of its context, taking no note of the real world rationale for such a statute. Any notion

that the Virginia statute served a purpose markedly different from the St. Paul ordinance is in fact belied by the Virginia Supreme Court's finding that the historical context of cross burning makes it "clear that the Commonwealth's interest in enacting the cross burning statute is related to the suppression of free expression." *Black*, 262 Va. at 775. Further, such a non-contextual approach to analyzing Virginia Code § 18.2-423 would also be wholly at variance with this Court's analysis in *United States v. Eichman*, 496 U.S. 310 (1990), which held that First Amendment scrutiny is not avoided because the terms of a statute may not *expressly* target only a single message or viewpoint. Such exacting review is appropriate where, as here, analysis of the law and its impact reveal beyond doubt that "the Government's asserted interest is related to the suppression of free expression." *Id.* at 315 (internal quotation marks omitted).

Nonetheless, the Commonwealth insists that, in contrast the federal statute invalidated in *Eichman*, the target of Virginia Code § 18.2-423 is not the message or viewpoint conveyed by the burning of a particular object, but is instead the threat potentially created, or the fear potentially instilled, by such an act. "The Virginia General Assembly long ago enacted a ban on cross burning, but only when accompanied by an attempt to intimidate someone." *Petitioner's Brief at* 9. "Where there is no intent to intimidate, the statute does not apply." *Id.* at 18. "[A]n *innocent* cross burner—i.e., one who burns a cross *without* an intent to

intimidate...is not barred by the statute." *Id. at 43* (emphasis in original).

The Commonwealth seeks to avoid the impact of *Eichman* upon comparable viewpoint discrimination grounds simply by arguing that individuals who wish to use the symbol of a burning cross to express their views are free to do so as long as they do it without the intent to threaten another person.[1] The Virginia Supreme Court correctly rejected this theory, recognizing that the real target of Virginia Code § 18.2-423 is *all* cross burnings and the racist values they have come to symbolize. As the court below observed, "[w]hen asked how the Commonwealth could justify the inference of intimidation provided in the last sentence of the statute, the Commonwealth relied upon the historical context of cross burning." *Black*, 262 Va. at 776. It seems abundantly clear that the Commonwealth takes the position that all cross burnings should be prohibited because of their potential effect upon those who view them. "Cross burning is a form of intimidation – a threat of harm." *Petitioner's Brief* at 34. "Cross burning presents a special case of intimidation." *Id. at 37.* "To treat cross burning as intimidation is simply to recognize the 'shorthand' already in use

[1] The Commonwealth further attempts to distinguish *Eichman* on the grounds that it involved flag desecration, "an act that enjoys the full protection of the First Amendment," whereas this case involves the constitutionally proscribable expression of threats. *Petitioner's Brief* at 18. This is an apples and oranges comparison. Such a distinction would be valid only if the statute struck down in *Eichman* prohibited flag desecration undertaken with the intent of intimidating another person. Ironically, under the Commonwealth's theory such a statute would be constitutional because it targets not the expressive act of burning a flag but the

and already understood by perpetrator and victim alike." *Id.* at 41. Thus, the Commonwealth seems to claim both that (1) Virginia Code § 18.2-423 is viewpoint-neutral because its sweep does not include cross burnings undertaken *without* an intent to intimidate, and, (2) every cross burning is an act of intimidation. The Virginia Supreme Court correctly held that "the Commonwealth cannot have it both ways." *Black*, 262 Va. at 776.

Virginia Code § 18.2-423 unmistakably targets the viewpoint that the symbolic act of burning a cross conveys. To consider the statute viewpoint-neutral would require a finding that the concern motivating §18.2-423 is simply the igniting of two pieces of wood joined at right angles. To the contrary, this section singles out for criminal punishment a particular and widely recognized message, on the basis of its content and viewpoint, and because of its potential effect upon observers. The public burning of a cross is a symbolic act deeply offensive and odious to the vast majority of American citizens, but not to all. For those few, a burning cross is a symbol of white supremacy. *See Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 770–71 (1995) (Thomas, J., concurring). That Virginia Code §18.2-423 may not specify the Ku Klux Klan as the only potentially affected speaker does not avoid constitutional challenge, for this section clearly targets the use of a particular symbol that has come to represent the Ku Klux Klan and its viewpoint on issues of race. *See id.* (Thomas, J., concurring). By targeting a particular symbol,

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proscribable expression of intimidation.

the Commonwealth essentially is attempting to do what concerned this Court in *Cohen v. California*, when it stated, "we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views." 403 U.S. 15, 26 (1971).

C. The dictates of the First Amendment cannot be avoided by simple word play.

The clear implication of the Commonwealth's defense of the Virginia Code § 18.2-423 is that the phrase "with the intent of intimidating" serves to validate, under the First Amendment, a prohibition that would otherwise be suspect as content- and viewpoint-specific regulation of expression. The Commonwealth's rationale, for example, would seem to justify a statute that criminalized "the public display of a cross erected with the intent to intimidate," and went on to state that "any such display of a cross is prima facie evidence of an intent to intimidate." So long as a statute is limited to displaying a cross "with the intent to intimidate," the Commonwealth would presumably argue, the First Amendment would be satisfied. It seems, however, highly doubtful that any court would rule against the myriad Christian churches which undoubtedly would mount a facial challenge to any such statute. These churches would prevail in their challenge for the same reason that appellant must succeed in his challenge to

Virginia Code § 18.2-423 – the symbolic expression targeted by such a statute is fully protected under the First Amendment.

Such a hypothetical scenario, though analytically apposite, casts in bold relief the basic flaw in the Commonwealth's argument: The insertion of the phrase "with the intent of intimidating" as a talismanic appendage to an otherwise viewpoint discriminatory statute simply will not satisfy the First Amendment, particularly when government, as discussed below, has viewpoint-neutral means at its disposal to protect citizens from intimidation.

D. The Commonwealth is not without constitutionally valid means by which to achieve its laudable goals.

Invalidating Virginia Code § 18.2-423 does not deprive the Commonwealth or other states of the capacity to enact and enforce general and viewpoint-neutral laws against cross burning and other forms of similar conduct. In *R.A.V.*, this Court stressed both the obligation of, and the options for, government in areas where overly broad regulation abridges protected expression:

> [T]he danger of censorship presented by a facially content-based statute requires that that weapon be employed only where it is necessary to serve the asserted [compelling] interest. The existence of adequate content-neutral alternatives thus undercut[s] significantly any defense of such a statute, casting considerable doubt on the government's protestations that the asserted justification is in fact an accurate description of the purpose and effect of the law.

505 U.S. at 395 [internal quotation marks and citations omitted, alterations in original]. Such content-neutral alternatives would involve, for example, targeting conduct such as trespass and arson. Government may also narrowly target certain forms of expression such as threats to kill or do serious bodily harm, *cf.* Virginia Code § 18.2-60. In *United States v. Hayward*, two trespassing cross burners were convicted under a content-neutral federal law prohibiting the use of "*fire* or an explosive to commit a felony." 6 F.3d 1241, 1246 (7th Cir. 1993)(emphasis added).

Any concern that striking down Virginia Code § 18.2-423 could benefit lawless actors by invalidating other laws aimed at intimidation seems unwarranted. That suggestion assumes, incorrectly, that intimidation is the gravamen of every offense in which "intimidation" is an element. In fact, in most such crimes the gravamen of the offense is the specific goal or object of coercing another person to act – or to refrain from acting – in ways that the person would not otherwise have acted. *See, e.g.*, Virginia Code § 18.2-47 (kidnapping); Virginia Code § 18.2-61 (rape); Virginia Code § 18.2-460 (obstruction of justice); Virginia Code § 24.2-1000 (hindering election officials); Virginia Code § 40.1-53 (interference with employment). In making such actions as these unlawful, intimidation is not the focus of the criminal charge, but rather the means by which one carries out what is clearly an illegal – and constitutionally unprotected – activity or enterprise. In the instant case, by contrast, intimidation is the end result which the

Commonwealth suggests it wishes to prevent; it may not do so, however, by prohibiting lawful, constitutionally protected speech or activities.

Virginia Code § 18.2-423 makes criminal the expression of a particular viewpoint, hateful and abhorrent though it may be to the vast majority of Virginians and Americans. That is precisely what the Supreme Court has consistently ruled that states may not do, however laudable their reasons. The Commonwealth, like St. Paul, Minnesota, "has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire." *R.A.V.*, 505 U.S. at 396.

II. THE SWEEP OF VIRGINIA CODE § 18.2-423'S PROHIBITION REACHES EXPRESSION BEYOND "TRUE THREATS" AND IS THEREFORE CONSTITUTIONALLY OVERBROAD.

Thus far, *amicus* has accepted arguendo the Commonwealth's assertion that Virginia Code § 18.2-423 prohibition of cross burning "with the intent of intimidating" is a prohibition of "true threats," a category of expression that receives less than the full protection of the First Amendment. Yet, as Justice Kinser noted in a concurring opinion, under Virginia law "[t]here is a difference between threat and intimidation." *Black*, 262 Va. at 780 (Kinser, J. concurring)(quoting *Sutton v. Commonwealth*, 228 Va. 654, 663

(1985)). "An act performed with the intent to intimidate... does not rise to the same level as a threat..." *Id.*

Freedom of speech requires the tolerance of expression that makes us uncomfortable, or that even frightens us. "[I]n our system, *undifferentiated fear* or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker*, 393 U.S. at 508 (emphasis added). Further, fear has sources other than threats. "Any variation from the majority's opinion may inspire fear." *Id.*

Despite the Commonwealth's claim to the contrary, it is readily apparent that the "intimidating" language of Virginia Code § 18.2-423 applies to expression beyond what this Court has deemed to be a "true threat." The precedent that is consistently cited for the principle that "true threats" receive little (if any) First Amendment protection is *Watts v. United States*, 394 U.S. 705 (1969). *See, e.g., Petitioner's Brief* at 14, fn. 7. Few who cite *Watts* for this purpose, however, call attention to the fact that the expression at issue there - a fairly explicit threat to kill the President of the United States - was found, when viewed in context, to be "political hyperbole" and therefore constitutionally protected. *Watts*, 394 U.S. at 708. "[A] statute such as this one, which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech." *Id.* at 707. To cite

Watts without any reference to its factual disposition misconstrues the holding of the case and is misleading.

The statute at issue in *Watts* provided, in pertinent part, that it was unlawful to make "any threat to take the life of or inflict bodily harm upon the President of the United States..." *Id.* at 705. Thus, the law explicitly defined both the target of the threat and that it had to be a threat of physical harm. Without these or similar specifics in a threat prohibition, the danger is far greater that "political hyperbole" and other forms of protected expression will fall under the sweep of the prohibition. Although the First Amendment does not protect threatening behavior, "[w]hen such conduct occurs in the context of constitutionally protected activity, [ ] 'precision of regulation' is demanded." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982) (citing *NAACP v. Button*, 371 U.S. 415, 438. n52 (1963)).

The best evidence that Virginia Code § 18.2-423 lacks such requisite precision is the conviction of Barry Black. Mr. Black was convicted for burning a cross at a political rally. The rally took place on private property, with the permission of the owner, in a location where it was far from certain that any members of the groups (much less any specific individuals) that were targets of his alleged intimidation would see the burning cross. A conviction under these circumstances would not be possible even under the three cross burning statutes from other states that the Commonwealth cites in support of Virginia Code § 18-2-423.

Under the California and Florida statutes at issue in, respectively, *People v. Steven S.*, 31. Cal. Rptr. 2d 644 (Cal. App. 1 Dist. 1994), and *State v. T.B.D.*, 656 So. 2d 479 (Fla. 1995), there is a requirement that the cross burning take place on the property of another without the permission of the owner. (Indeed, in *Steven S.*, the court *specifically* recognized that a cross burning at a Ku Klux Klan rally would be constitutionally protected. 31 Cal. Rptr. 2d at 648.) In its brief, the Commonwealth questions the distinction between burning a cross on someone's yard without their permission and burning a cross just beyond that same person's property line. *Petitioner's Brief* at 33, n. 19. The answer to the Commonwealth's query is that linking criminal culpability with unauthorized access to property limits the circumstances under which a prosecution can be initiated. Thus, the potential of the statute reaching protected expression is greatly reduced.[2]

Although the Washington statute at issue in *State v. Talley*, 858 P.2d 217 (Wash. 1993) contained no requirement of owner

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[2] Where the speech takes place on private proper with the owner's consent or at the owner's invitation, the extension of criminal sanctions is particularly ominous for both free speech rights and property rights. *Cf. City of Ladue v. Gilleo*, 512 U.S. 43 (1994)(placing of political signs at private residence has distinct expressive value); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975)(potential offensiveness to unwilling viewers of movies with scenes of nudity is insufficient to justify ban of such movies being shown at privately-owned drive-in theaters with screens visible from the street); *Spence v.Washington*, 418 U.S. 405 (1975)(property concept central in overturning conviction of individual who, on private property, violated statute prohibiting improper use of American flag); *see also* Norman Dorsen, Joel Gora, *Free Speech, Property, and the Burger Court: Old Values, New Balances*, Supreme Court Review, 195 (1982).

authorization, it did contain a limiting provision requiring that the context of the cross burning be taken into account.

> [I]t does not constitute malicious harassment for a person to speak or act in a critical, insulting, or deprecatory way *unless the context or circumstances surrounding the words or conduct* places another person in reasonable fear of harm to his or her person or property or harm to the person or property of a third person . . . [.]

Id. at 221 (emphasis added). On the basis of this provision, the Washington State Supreme Court affirmed *the dismissal of charges* against a defendant who burned a cross on his own property but was targeting a group of African-Americans on the adjoining property. *Id.*

Virginia Code 18.2-423 contains no provisions to ensure that its sweep is limited to the "true threats" envisioned in *Watts v. United States*. Without such limiting provisions, it is unconstitutionally overbroad.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully urges this Court to affirm the judgment of the Supreme Court of Virginia.

Respectfully submitted,

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